No. 79-6853

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

LEAH LYNN PARRISH WEBB,

Petitioner,

v.

JAMES THOMAS WEBB,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF GEORGIA

BRIEF OF RESPONDENT

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QUESTION PRESENTED

Respondent feels that the writ of certiorari was improvidently granted in this case. See p. 7 - 11, *infra.* Assuming, however, that the Court reaches the merits of this controversy, we feel that Petitioner's framing of the question presented is inadequate in that it fails to note that the Uniform Child Custody Jurisdiction Act is a comity based Act and that the *original* decree which Petitioner sought to enforce in Georgia was, in fact, a *Georgia* judgment. Respondent would pose the question as follows:

Does Article IV, Section 1 of the Constitution of the United States require Georgia, a state which has adopted the comity based Uniform Child Custody Jurisdiction Act, as part of a proceeding in Georgia to modify its own custody decree, to give full faith and credit to a Florida decree which is based upon the prior Georgia judgment?

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STATEMENT OF THE CASE

The Petitioner's statement of the case is substantially accurate insofar as it goes. Some supplementation is necessary, however, to ensure that the Court's attention is directed to all relevant factors which are necessary to a proper consideration of the question presented for review.

To begin with, it should be noted that, while there is a full transcript of the hearing held in the Georgia proceeding, there is no record of any evidence having been taken in the Florida case except for a bare recital to that effect in the two orders passed by the Florida Circuit Judge.[1] (J.A. 17, 25) An affidavit submitted by Petitioner contains only information routinely required by Section 61.132 of Florida's Uniform Act. (J.A. 11) The only part of this affidavit which is pertinent to the questions before this Court is the portion which informed the Florida court that: (1) There had been prior litigation over the minor Shane S. Webb in Georgia in 1977 and (2) There was probably pending litigation over Shane S. Webb at that very moment. (J.A. 11-12)

The Georgia court found that the respondent had retrieved his child from Florida in the face of an emergency and that under the appropriate provision of the Georgia Uniform Child Custody Jurisdiction Act,[2] Georgia was vested with

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[1]This may be a material point as it apparently was in *Halvey v. Halvey,* 330 U.S. 610, 67 S.Ct. 903, 91 L.Ed. 1133 (1947); see also, Footnote 3, *infra.*

[2]Ga. Code Ann. Section 74-504(2)(3). The Uniform Act became effective in Georgia on January 1, 1979, and in Florida on October 1, 1977. See 9 Uniform Laws Annotated, p. 111 (1979). The original custody decree was rendered by the Superior Court of Berrien County, Georgia on September 22, 1977.

jurisdiction over a proceeding to modify its original custody decree. There is a little bit more to the factual basis for this finding than is suggested by Petitioner's statement of the case. A sample of the evidence available to the Georgia trier of fact follows:

Shane Scott Webb, the child at the center of this controversy, is six years old. (J.A. 20) His mother, the Petitioner, was granted custody under the 1977 Georgia judgment, and with this privilege went the corollary duties which are always present when a parent is charged with the responsibility of caring for a small child.

On February 17, 1979, the Respondent, a Nashville, Georgia, policeman, received a Telex message from the Florida authorities concerning his son. (T. 21-22) Acting upon the advice of the Alachua County, Florida, division of Family Services, he immediately traveled to Gainesville, Florida and contacted the Sheriff's Department. (T. 22-23) Respondent then went to Petitioner's residence and talked with the neighbors. He took possession of his child and, following a conversation with a juvenile officer of Alachua County, left his address with the authorities and brought Shane back to Georgia. (T. 124)

At the time Respondent arrived at Petitioner's residence in Florida, Shane had been taken next door to the neighbor's house. (T. 25) Petitioner was not at home and never came home while Respondent was there with Shane. (T. 25) It was later learned that Petitioner had gone to Miami, Florida, for the week-end and had left Shane in Petitioner's home in the custody of a 12-year-old half-sister. (T. 26) The circumstances requiring Petitioner to leave her small son in the care of a 12-year-old girl and travel to Miami for the week-end are not in the record since Petitioner, through her attorney, declined to answer a question requesting that information. (T. 105)

Petitioner recites in her statement of the case that "Respondent filed an action for custody in the Superior Court of Berrien County, Georgia." It should be emphasized that Respondent's action was not a first instance custody suit, but was a complaint seeking to have the September 22, 1977, Georgia custody decree modified *by the very court which had issued it originally*. (J.A. 20-21) The material "change of circumstances" time frame was from September 22, 1977, (the date of the original decree in Georgia) until March 23, 1979, (the date of the Georgia complaint). (J.A. 20-24)

At the time Georgia issued its custody decree on June 21, 1979, the Court had before it and subject to its jurisdiction, both parents and the child. Personal jurisdiction of Petitioner was accomplished by her Answer and general appearance. (J.A. 29, T. 3)

The statement of the case of Petitioner asserts that the full faith and credit issue was preserved in her enumerations of error before the Georgia Supreme Court. In neither her Answer (J.A. 34) nor her enumerations of error No. VI (See Appellant's brief, Supreme Court of Georgia) does Petitioner specifically invoke Article IV, Section 1 of the United States Constitution. In the argument portion of her brief in the Georgia Supreme Court, she devotes one line to this issue at page 20: "In such circumstances, Appellant asserts, the decree entered in Florida should have been recognized as a final order subject to full faith and credit." Only in her petition for writ of certiorari to this Court does Petitioner finally set out Article IV, Section 1 of the United States Constitution as the basis for her contention. She asserts further that "Georgia declined to specifically rule on the full faith and credit question presented." (Petitioner's brief, p. 8) In fact, the court in *Webb v. Webb,* 245 Ga. 650

(1980), never mentioned full faith and credit or even hinted that it had been considered by the Justices. This is not at all surprising since the full faith and credit issue was never focused by Petitioner in her appeal to the Supreme Court of Georgia. In her motion for rehearing to that court Petitioner failed to even mention full faith and credit or to remind the court that this point had been overlooked. (See Appellant's Motion for Rehearing, Supreme Court of Georgia.) It is obvious that the full faith and credit clause of the United States Constitution was never considered by the Georgia court since Petitioner never really argued the point in that forum.[3]

SUMMARY OF ARGUMENT

A careful review of the record in this case reveals that the writ of certiorari has been improvidently granted.

In *Halvey v. Halvey,* 330 U.S. 610, 67 S. Ct. 903, 91 L.Ed. 1133 (1947), this Court decided the child custody full faith and credit issue on the basis of "a failure of proof that the Florida decree received less credit in New York than it had in Florida." 330 U.S. at 615. The present record presents the same problem - a total absence of a transcript to show what, if any, evidence the Florida court heard in support of its decree. Finality of the Florida decree is an important issue in this case if the Court reaches the merits of

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[3]Rule 45 of the Supreme Court of Georgia states that "any" enumerated error which is not supported by argument or citation of authority shall be deemed abandoned." Georgia Code Ann. Section 24-4545. This and various other points are material to the question of whether certiorari has been improvidently granted in this case. See, Footnote 1, *supra* and p. 7-11, *infra.*

the full faith and credit question raised by Petitioner. In the absence of a transcript or some credible proof of the evidence heard by the Florida court, it will be impossible to deal with the issue of finality of the Florida decree. There is no way for this Court to deal with an argument asking that Georgia be foreclosed from hearing evidence which Florida heard, when there is no way to determine what evidence the Florida court had before it.

It also appears that since Petitioner did not properly raise and argue the full faith and credit issue in the court below, that issue was treated as abandoned under Georgia Supreme Court Rule 45, Ga. Code Ann. Section 24-4545. This explains why the Georgia Supreme Court's opinion makes no mention of full faith and credit. Having been improperly raised in the Georgia courts, this issue should not be entertained by this Court.

Of substantial significance is the fact that the Florida decree is in reality a Georgia decree in disguise. The Florida court merely recognized the previous Georgia judgment under the U.C.C.J.A. and Petitioner then sought to enforce that judgment in Georgia. The Georgia court is, in effect, being asked to give full faith and credit to its *own* judgment, a novel approach to say the least. No authority has been cited so far requiring such a result.

This is not a true child snatching case. Respondent went to Florida for his child at the urging of the Florida authorities and with their full knowledge and consent. The child was returned to Georgia, the state where the original custody decree was rendered. Georgia, by its decisions in *Matthews v. Matthews,* 238 Ga. 201 (1977); *Reid v. Adams,* 241 Ga. 521, and *Yearta v. Scroggins,* 245 Ga. 831 (1980), has been, and still is, on record as condemning child-snatching. The opinion below was based on comity and policy con-

siderations, as well as a state law construction of the U.C.C.J.A. These adequate non-federal grounds are sufficient for this Court to refuse to review the full faith and credit issue, particularly where the law of Georgia so clearly adds no fuel to the child-snatching dilemma.

The new "Parental Kidnapping Prevention Act of 1980" is designed to bring stability into the area of interstate enforcement of custody decrees. This federal Act will give rise to a body of law, supervised by this Court, which will control, regulate and enforce the proceedings which now trigger child-snatching. The precise issue in our case will probably never come up again, and there is, accordingly, no compelling reason for this Court to deal with it at the present time.

Florida's decree does not have the requisite finality to be entitled to full faith and credit even if this Court were to hold that Article IV, Section 1 of the Constitution does apply to child custody decrees. Under Florida law the Florida decree was subject to prospective modification as to facts not before the court at the time of the decree. In the absence of a transcript of the Florida proceedings, the finality question cannot even be intelligently discussed.

Furthermore, the U.C.C.J.A. is a comity based Act to which full faith and credit should, by very definition, have no application. The Act was designed to be enforced by cooperation among the adopting states, not by a mandatory Constitutional concept such as full faith and credit. This Court has never held that full faith and credit applies to the typical child custody decree, much less a decree issued pursuant to a comity based Act. Such an application has no theoretical basis to support it.

In addition, Petitioner filed her petition and the Circuit Court of Alachua County, Florida, issued its judgment

pursuant to the U.C.C.J.A. Florida had adopted the Act and was subject to its jurisdictional rules. However, Florida did not follow Sections 14 and 15 of the Act; therefore, Florida did not have jurisdiction of the matter. Under section 15 Florida was authorized to recognize and enforce the original Georgia decree. This section could not, under the correct interpretation of the U.C.C.J.A., confer jurisdiction upon the Florida court. Further, the Florida court improperly modified Georgia's original decree without jurisdiction under section 14 of the U.C.C.J.A. Section 14 directed Florida to determine whether or not Georgia retained jurisdiction under the Act; if it did, the Florida court was to defer to the Georgia court. Georgia need not give full faith and credit to a judgment made without jurisdiction of the subject matter or the person. *Durfee v. Duke,* 375 U.S. 106. Since no issue was made of jurisdiction in the Florida court, the Georgia court could consider the validity of Florida's jurisdiction. Therefore, the Georgia court could have properly denied full faith and credit to the Florida court's final judgment.

Finally, Petitioner's argument on personal jurisdiction is totally without merit. *May v. Anderson,* 345 U.S. 528, 73 S. Ct. 840, 97 L.Ed. 1221 (1953), absolutely prevented the Florida court from exercising personal jurisdiction over Respondent. Under this Court's recent decisions, such as *Kulko v. California,* 436 U.S. 84, 56 L.Ed.2d 132, 98 S. Ct. 1690 (1978), dealing with the assertion of personal jurisdiction by a state over a non-resident, there is no basis for what Florida attempted to do. The isolated trip of Respondent to Florida in relation to his family problem in no way subjected him to an assertion of power by Florida. Furthermore, personal jurisdiction in the due process sense has no application to a comity based Act such as the

U.C.C.J.A. which does not contemplate any enforcement authority for its judgments other than cooperation by other adopting states.

The decision of the Georgia Supreme Court should be affirmed.

ARGUMENT

I.

THE WRIT OF CERTIORARI IN THIS CASE HAS BEEN IMPROVIDENTY GRANTED SINCE THE RECORD DOES NOT PRESENT THE QUESTION IN A MANNER WHICH IS APPROPRIATE FOR DECISION BY THIS COURT.

Without unduly belaboring this point, Respondent is of the opinion that the present case is a poor vehicle for this Court to use to decide the important and complex Constitutional law question presented for review. Some of the factors which we believe should be considered on this threshold question are more fully discussed in Respondent's argument on the merits, *infra.* All of these considerations, however, are noted at this juncture so that the multitude of problems with the record can be seen individually and collectively.

As noted in our statement of the case, there is apparently no transcript of the Florida proceeding. It is thus impossible to know what, if any, evidence the Florida trial court heard to support its decree. This situation bothered the Court in *Halvey v. Halvey,* 330 U.S. 610, 67 S. Ct. 903, 91 L.Ed. 1133 (1947), where the evidence in the Florida proceeding was not in the record. The Court accordingly bypassed the

full faith and credit issue and decided the case on what was basically "a failure of proof that the Florida decree received less credit in New York that it had in Florida". 330 U.S. 615. The same problem exists here and militates against a consideration of the merits of the question presented.

Also, as noted in our statement of the case, the full faith and credit Constitutional question was never properly raised and argued by the Petitioner until the petition for certiorari was filed with this Court. The Georgia Supreme Court never mentioned it in their opinion and obviously treated that enumeration of error as having been abandoned under Rule 45 of that Court. Ga. Code Ann. Section 24-4545. In petitioner's motion for rehearing, full faith and credit was never mentioned even though the office of such a motion is usually to call the attention of a court to an issue or authority which has been overlooked. Since the issue of full faith and credit was not properly raised or considered in the court below, this Court should decline to deal with it at this time.

The *initial* decree dealing with custody of Shane Webb was issued by the *Georgia* court on September 22, 1977. (J.A. 2) It was this Georgia judgment which the Florida court merely adopted, (J.A. 25-26) and which petitioner sought to enforce against Respondent in the very same court in Georgia which issued it. In essence, the Georgia court was asked to apply the full faith and credit clause of the United States Constitution to its *own judgment* and to surrender the right to modify that judgment in a proceeding which was already pending when the Florida decree was rendered. It is difficult to see a precise and crisp full faith and credit issue emerging from a factual situation such as this one where the judgment sought to be given full faith and credit is actually one handed down by the forum state. This consideration is dealt with more fully, *infra,* and it is sufficient at this time to

say that the full faith and credit issue is certainly further obscured and emasculated by this factor.

In its amicus brief, the National Conference of Commissioners on Uniform State Laws points out that this is not a child-snatching case. We agree with them. If Respondent kidnapped his child, the record shows that the Florida authorities aided and abetted him in doing it. (See statement of the case, p. 2, *supra*).

No attempt has been made to avoid the jurisdiction of the state issuing the original custody decree dealing with this child; namely, Georgia. In this connection it is noteworthy that the Georgia Supreme Court was on record as condemnin child-snatching even before the U.C.C.J.A. was adopted in Georgia. See *Matthews v. Matthews,* 238 Ga. 201 (1977);[4] *Reid v. Adams,* 241 Ga. 521 (1978). In the recent case of *Yearta v. Scroggins,* 245 Ga. 831 (1980), Georgia enforced under the UCCJA a Missouri judgment which had been entered without personal jurisdiction of the Georgia mother and compelled her to return the children she was wrongfully detaining. The Court based its decision upon comity and enforced the judgment even though there was "no personal jurisdiction that would satisfy the full faith and credit clause of our federal Constitution". 245 Ga. 832. In a footnote, the court pointed out that the instant case, *Webb v. Webb,* was "limited to its facts" because of the extreme emergency which existed when the Florida authorities contacted Respondent. 245 Ga. 833, footnote 3.

A reading of the *Matthews, Reid* and *Yearta* opinions

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[4]The *Matthews* court found "as a matter of public policy that a noncustodial parent should not be able to entice the custodial parent into his jurisdiction for purposes of relitigating questions of custody." 238 Ga. at 201.

makes it abundantly clear that Georgia decisions do not encourage child-snatching by non-custodial parents. This case, *Webb v. Webb,* was decided under the UCCJA on the basis of comity.[5] Full faith and credit under the federal constitution played no part in it because there was a non-federal ground available as a basis for the decision. If this ground is found to be an adequate basis for the Georgia court's decision, then Petitioner's full faith and credit issue should not be considered in the present proceeding. If *Matthews* and *Reid, supra* reveal an anti-child snatching policy on the part of Georgia and if *Webb v. Webb* was decided on a non-federal ground (comity and policy considerations), as well as being limited to its facts by *Yearta,* there exists no compelling reason for this Court to be concerned about the impact of this case on child custody decree litigation between the several states. *Webb* was an isolated decision,[6] decided on the basis of state law comity. It has been limited to its facts by the court which decided it and should be left in its present condition.

Another point which weighs heavily against the wisdom of reviewing the full faith and credit issue raised by this case is the fact that Florida has obviously misinterpreted and misapplied the plain language of the U.C.C.J.A. while in the process of issuing its decree. See, *infra,* p. 26 - 36. The full faith and credit issue should not be decided on the basis of such an incorrect statutory interpretation.

Finally, the reasons for reviewing this case are now less compelling than ever since passage by Congress of the

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[5]More will be said about the significance of this factor, *infra,* p. 23.

[6]Present court-appointed counsel have been advised by prior counsel for the Respondent that Shane Webb is presently in Florida in the care and custody of Petitioner's mother.

"Parental Kidnapping Prevention Act of 1980."[7] This Act contains many of the same provisions found in the UCCJA and is obviously based largely upon the language of that Act. The primary difference is that the federal act is not based upon comity, but requires orders issued thereunder to be given full faith and credit in the federal Constitutional sense. Of course, no one can assess the full impact of this new Act at such an early stage of its existence. However, we can foresee with certainty that a body of federal decisional law will immediately begin to form around it. The precise issue in our case will probably never arise again since comity will no longer serve as the basis for determining child custody issues between the various states. In the face of this new Act, there is really no good reason why this Court should decide the full faith and credit issue which the petitioner urges upon it.

The writ of certiorari should be dismissed as having been improvidently granted.

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[7]We have been advised that the President signed this Act into law during December, 1980. It is designed to implement the full faith and credit clause and is to be found at 28 U.S.C. Section 1738A.

II.

UNDER THIS COURT'S PRIOR DECISIONS, GEORGIA WAS NOT REQUIRED TO GIVE FULL FAITH AND CREDIT TO A CHILD CUSTODY DECREE OF THE STATE OF FLORIDA ISSUED PURSUANT TO AN ACT WHICH HAS EXTRATERRITORIAL EFFECT ONLY ON THE BASIS OF COMITY AND WHICH DECREE WAS FOUNDED UPON A PRIOR JUDGMENT OF A GEORGIA COURT.

Petitioner urges this Court to take several giant steps in the full faith and credit area. First, the Court is asked to apply the full faith and credit clause of the United States Constitution to child custody decrees—something which this Court has so far declined to do. Secondly, the Court is asked to apply this Constitutional provision to a judgment issued under a comity based Uniform Act—a proposition which is theoretically suspect. Finally, petitioner asks that Georgia be required to give full faith and credit to what is in reality its own decree. The prior decisions of this Court do not support Petitioner's efforts in the context of the present case.

In the brief filed by petitioner and various amici, the previous decisions of this Court dealing with full faith and credit in the area of child custody decrees have been alluded to as confusing and conflicting. Respondent submits that, while these decisions may not have brought stability to the area of enforcement of interstate child custody decrees, they are neither confusing nor conflicting, and they were decided on the basis of sound reasoning and analysis of the type that must be applied to the case *sub judice.* Stemming the tide of child snatching, an end desired by all of us, should not be accomplished by just any means at hand to the exclusion of

sound legal doctrine and principles. The result sought by Petitioner through the medium of the present case would require the Court to abandon the analytical approach it has taken in this area over several decades.

It appears that this Court has dealt with some aspect[8] of the full faith and credit child custody question on four prior occasions. There is nothing in these four[9] decisions to cause optimism on the part of Petitioner. They are replete, however, with considerations which support the position taken by Respondent in this Court.

An application of *Halvey* alone to the facts presented in this record reveals the untenable position of Petitioner. The pertinent facts of that case are very close to ours.

The forum state in *Halvey* was New York, where the parents had been married and the child in question had been born. After marital difficulties arose, the wife went to Florida with the child and brought a proceeding for divorce and custody. Mr. Halvey was not personally served and made no appearance in the Florida proceeding. Prior to the Florida decree granting Mrs. Halvey a divorce and custody of the child, Mr. Halvey took physical possession of his son and returned him to New York. Mrs. Halvey then came to New York and, on the basis of the Florida judgment, sought

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[8]Because of the analytical approach which the Court has traditionally taken to this issue, a number of other decisions actually dealt with some of the same considerations faced in the child custody cases. See *e.g., Sistare v. Sistare,* 218 U.S. 1, 54 L.Ed. 905, 30 S. Ct. 682 (1909); *Estin v. Estin,* 334 U.S. 541, 92 L.Ed. 1561, 68 S. Ct. 1213 (1948).

[9]*Halvey v. Halvey,* 330 U.S. 610, 67 S. Ct. 903, 91 L.Ed. 1133 (1947); *May v. Anderson,* 345 U.S. 528, 73 S. Ct. 840, 97 L.Ed. 1221 (1953); *Kovacs v. Brewer,* 356 U.S. 604, 78 S. Ct. 963, 2 L.Ed. 1008 (1958); *Ford v. Ford,* 376 U.S. 197, 83 S. Ct. 273, 9 L.Ed.2d 240 (1962).

the return of her child in a habeas corpus proceeding. A full hearing was held, and New York substantially modified the Florida custody award. At the time the New York court ruled, it had jurisdiction over both parents, and the child was present within the forum state.[10]

When *Halvey* reached this Court, the inquiry centered on the question of the finality to be given the decree in the rendering state—Florida.[11] The Florida law was viewed as treating the decree as final in the res judicata sense only as to facts before the court at time of judgment. *Since there was no record of the evidence heared by the Florida court,* there was no way for this Court in *Halvey* to determine what was final and what was not. "There [was], therefore, a failure of proof that the Florida decree received less credit in New York than it had in Florida." 330 U.S. 615, 91 L.Ed. at 1136. Since Florida had remained free to modify the decree, the New York court was entitled to the same latitude. "So far as the full faith and credit clause is concerned, what Florida could do in modifying the decree, New York may do." 330 U.S. 614, 91 L.Ed. 1136. New York's modifying decree was, accordingly, affirmed.

Halvey specifically identified itself as a "narrow ground" decision and found it unnecessary to deal with the precise full faith and credit issue presented by the certiorari petition.

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[10]These factors were duly noted in the *Halvey* opinion, 330 U.S. 615, 91 L.Ed. 1136, and are Constitutionally significant in evaluating the action taken by a court dealing with full faith and credit and a custody decree, whether it is the forum court or the court issuing the original decree.

[11]This issue was also central to the decisions in *Kovacs* and *Ford, supra,* Note 9, as well as other cases of this court dealing with full faith and credit in connection with decrees which are potentially subject to future revision. See, *e.g., Sistare v. Sistare, supra,* note 8; *Barber v. Barbe,* 323 U.S. 77, 89 L.Ed. 82 (1944).

In the instant case, the factual considerations weigh even more heavily in favor of sustaining the action of the forum state.

Georgia was the state of residence of both Mr. and Mrs. Webb at the time of divorce and the state where the child in question lived. Both parents were before the Georgia trial court and subject to its jurisdiction. The child was present within the state and was within the physical possession of the father.

In addition to these important facts, Georgia has one significant connection with the parties and the child which was not present in *Halvey*—the original divorce and custody decree was issued by the same trial court (in Georgia) which was the forum court in this case. (J.A. 2) The proceeding in Florida was on the basis of this georgia decree (J.A. 6, 25-26), and there is no record of what, if any, evidence was heard by the Florida court.

On this set of facts there was no basis for the Georgia Supreme Court to feel *compelled* by Article IV, Section 1 of the United States Constitution to give full faith and credit to the Florida decree.[12]

In the first place, the absence of a transcript of the evidence makes it impossible to adequately deal with the "finality" determination which is part and parcel of any full faith and credit question. We do not know what the Florida court heard in the way of evidence other than the fact that Respondent had removed his son to Georgia. The Georgia court placed great weight on the fact that Petitioner had left

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[12]As noted, *supra,* p. 3-4, 8, the full faith and credit issue was never properly raised in the court below. Since the Georgia Supreme Court never passed on the question, we must make our argument on the merits on the basis of what that court would have been Constitutionally required to do had the issue been adequately presented to it.

the child without adult supervision while she was away on some kind of a social week-end. It is doubtful that the "Miami trip", or any other facts which were uncomplimentary to Petitioner, (See J.A. 39, par. 2) were disclosed to the Florida judge. If they were not, then the Georgia court, as well as any other Florida court, was free to consider them on the modification question.[13] There is the same "failure of proof" and uncertain finailty which was present in the Florida decree in *Halvey* and which prompted the Court to honor the decree of the forum state.

Of even greater significance is the fact that the decree which the Georgia trial court had before it was its *own* judgment which had been issued in 1977. (J.A. 20-21) The Florida decree, rendered subsequent to the filing of the Georgia complaint for modification,[14] merely adopted the original Georgia judgment. (J.A. 25-26) The Florida circuit judge's final order is captioned in language which clearly demonstrates this fact: "FINAL JUDGMENT ESTABLISHING AND ENFORCING OUT-OF-STATE DECREE." (J.A. 25)

Petitioner was not only asking the Georgia court to give full faith and credit, in a Constitutional sense, to a Florida decree of dubious finality, she was also in substance asking the court to give full faith and credit *to its own decree.*[15]

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[13]The pertinent Georgia and Florida decisions relating to modification of child custody decrees and res judicata are discussed, *infra,* p. 25. Also to be noted is the fact that Florida did not even consider a "change of circumstances". See, *infra,* p. 25.

[14]The Georgia complaint was filed on March 23, 1979 (J.A. 23), and the Florida decree was signed on April 18, 1979. (J.A. 26)

[15]The Florida court did alter the visitation rights under the Georgia decree somewhat, but the basic issue before both the Florida and Georgia trial courts was that of custody. In both courts, Petitioner, in reality, relied upon the original Georgia decree. It is the position of the National Conference of Commissioners on Uniform State Laws in their amicus brief that the U.C.C.J.A. "does nothing to convert the Georgia decree to a Florida decree". We are in total agreement with that position. See *infra,* p. 36.

Article IV, Section 1 of the Constitution, on its face, and by its very terms, does not require any state court to apply full faith and credit to its own judgments; yet, that is in fact the position which Petitioner is urging upon this Court. *Halvey* permitted the original decree of a sister state to be modified by New York. Certainly Georgia is permitted to modify its *own* judgment in accordance with a finding of changed circumstances. See note 13, *supra*. There is simply nothing in this record to trigger even the potential application of the full faith and credit clause to the judgment which the Georgia court had before it. This Court should hold that Article IV, Section 1 of the Constitution has no application at all to the set of facts presented by this record.

The "finality" approach which the Court followed in *Halvey* was not something new or revolutionary in the area of full faith and credit litigation. At least as early as 1910 in *Sistare v. Sistare, supra,* note 8, this Court specifically engaged in that type of analysis in determining whether to give full faith and credit to past due installments under a decree for future alimony. See also, *Barber v. Barber, supra,* note 11. The Court has continued to deal with the finality question of full faith and credit cases in a variety of situations. See *e.g., Durfee v. Duke,* 375 U.S. 106, 11 L.Ed. 186, 84 S. Ct. 242 (1963), where it was stated that:

> "Full faith and credit thus generally requires every state to give to a judgment at least the res judicata effect which the judgment would be accorded in the state which rendered it. 'By the Constitutional provision for full faith and credit, the local doctrines of res judicata, speaking generally, become a part of national jurisprudence, and therefore federal questions cognizable here.' " 375 U.S. 109, 11 L.Ed. 190.

Two of the remaining cases of this Court dealing with full faith and credit in the area of child custody decrees also involve the finality question.

In *Kovacs v. Brewer, supra,* note 9, a New York mother sued in North Carolina to enforce a modified New York decree removing custody from the paternal grandfather (a North Carolina resident) and awarding it to the mother. Both the natural father and the grandfather were before the North Carolina court, and the child was present in North Carolina. A full hearing was held, and the North Carolina trial court ruled that the New York decree was not binding upon it and that the grandfather should retain custody of the child. The North Carolina Supreme Court affirmed. This Court granted certiorari and remanded the case to the North Carolina court, holding that if North Carolina based its ruling on changed circumstances within the purview of *Halvey,* it was unnecessary to consider the full faith and credit issue presented.

In so ruling, the court discussed res judicata and the finality of the New York judgment under the law of New York, finding that the New York decree was subject to modification on the ground of changed circumstances. Thus, if North Carolina found changed circumstances, it could vary the New York judgment.

The final decision of the Court in this area dealing with the finality approach was *Ford v. Ford, supra,* note 9. The decree sought to be enforced in the South Carolina court was a "dismissed agreed" order of a Virginia court, entered after the husband and wife had negotiated a child custody agreement between themselves without any intervention or participation by the court. The forum (S.C.) court had before it the mother, who had physical custody of the children in that state. The husband was also before the court, having answered the wife's complaint in a South Carolina state court. A full hearing was held in South Carolina. The Virginia order was refused full faith and credit, and the

mother prevailed on the custody issue. The South Carolina Supreme Court reversed and held that since Virginia would grant full faith and credit to the "dismissed agreed" order, South Carolina must do the same. On certiorari, this Court reversed, holding that the Virginia law did not view such an order as res judicata and that South Carolina was not required to give it full faith and credit so as to preclude South carolina from considering changed circumstances and the Carolina from considering changed circumstances and the best interest of the children. In declining once again to rule squarely on the full faith and credit issue, the Court alluded to *Halvey* and *Kovacs* and resolved the case on the basis of an analysis of "finality" in relation to the decree sought to be enforced in the forum state.

This Court has obviously made the finality analysis approach an integral part of the Constitutional law in the full faith and credit area, and, as evidenced by *Halvey, Kovacs,* and *Ford,* has given it particular significance where child custody decrees are involved. There is nothing wrong with that decisional process since it clearly recognizes and accommodates the fact that child custody decrees are really never "final" in the usual res judicata sense; that is, not subject to revision in the future. Indeed, child custody decrees should not be viewed as final because the best interest of children would not be served by any principle that foreclosed the intervention of a court to change or alter custody to protect or provide proper care for the child. That child custody decrees are always subject to change is well accepted as a universal doctrine in the common law world. Any other rule would be less than civilized.

We may have to simply face the fact that child custody decrees are so inherently subject to change that they cannot be dealt with in a workable fashion purely under the full faith

and credit clause of the Constitution. Justice Frankfurter sensed this in his concurrence in *May v. Anderson, supra,* note 9, when he said:

> "But the child's welfare in a custody case has such a claim upon the state that its responsibility is obviously not to be foreclosed by a prior adjudication reflecting another state's discharge of its responsibility at another time." 345 U.S. 536, 97 L.Ed. 1228.

The answer to the lack of stability in this area may be in federal legislation such as the new "Parental Kidnapping Prevention Act of 1980",[16] *supra,* note 7. That Act will permit the development of a body of law, supervised by this Court, which is uniformly applicable and enforceable as to all the states. The U.C.C.J.A. is subject to interpretation by each state which enacts it because it is a comity based Act. The new federal Act does not have this shortcoming and is potentially a far more potent and workable vehicle to combat child-snatching than the present case. The result sought by Petitioner would attach full faith and credit, a mandatory type concept, to child custody decrees which are just the opposite. The Court has declined to do this in the past and its decisions such as *Halvey, Kovacs* and *Ford* reflect that wisdom. These decisions are fatal to Petitioner's argument in the present proceeding. They should not be departed from at all, but should be reaffirmed. The parties who are concerned about child snatching should look to some other

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[16]Respondent has at this time no position one way or the other as to whether this new Act applies to the present litigation. Time limitations have so far prevented court-appointed counsel from studying and briefing this point. It is to be noted that Georgia has given the U.C.C.J.A. retroactive application even to a case on appeal. See, *Roehl v. O'Keefe,* 243 Ga. 696, N. 5 (1979).

more feasible source such as the new federal Act for a remedy to this problem.

The fourth case in this area which the Court has heard is *May v. Anderson, supra,* note 9. This case turned not on the question of "finality", but on the lack of personal jurisdiction over the absent wife by the court rendering the decree to be enforced.

In *May,* the husband and wife had married in Wisconsin and lived together there until the wife left to live in Ohio, taking their children with her. The husband obtained a Wisconsin divorce and custody decree without personal jurisdiction over the wife and then physically retrieved his children from Ohio. At a later time, when the children were visiting with the wife in Ohio, she refused to return them to Wisconsin. The husband then brought a habeas corpus proceeding in Ohio, seeking return of the children to him on the basis of the Wisconsin decree. The Ohio court granted full faith and credit to the Wisconsin decree and this Court reversed on certiorari.

Two crucial considerations required *May* to be decided the way it was by this Court. First, the Court recognized "that a mother's right to custody of her children is a personal right entitled to at least as much protection as her right to alimony."[17] Secondly, they found that Wisconsin did not have "the personal jurisdiction that it must have in order to deprive [the] mother of her personal right to their (her children) immediate possession." 345 U.S. 543, 97 L. Ed. 1227.

The critics of *May v. Anderson* choose to ignore the concept of personal jurisdiction which is so absolutely

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[17]The prior decision in *Estin v. Estin,* 334 U.S. 541, 92 L.Ed. 1561, 58 S. Ct. 1213 (1948) virtually demanded this conclusion.

fundamental to the administration of a system of laws between the several states. The potential for abuse in the absence of strict adherence to this principle was recognized as early as *Pennoyer v. Neff,* 95 U.S. 714, 24 L.Ed. 565 (1878) and continues to be viewed in this light in such recent decisions as *Kulko v. California,* 436 U.S. 84, 56 L.Ed.2d 132, 98 S. Ct. 1690 (1978). These critics also overlook *May's* protection of a parent's inalienable rights in a minor child. If *May* has encouraged child snatching, that is regrettable. It would be even more regrettable if this Court abandoned *May* and the important rights which it secures.

What application does *May* have to the present case? Respondent submits that in view of our argument on "finality", this decision does not even need to be considered. Petitioner urges, however, that the Florida court had personal jurisdiction of the Respondent and that the Florida decree should be given full faith and credit in Georgia.[18] *May* stands in Petitioner's path so she suggests that *May* be repudiated in the process. Such a repudiation of *May* would be neither prudent nor necessary.

In some of the amici curiae briefs which have been filed, it has been suggested that this Court is in the process of broadening and extending the basis for personal jurisdiction of a state over a non-resident defendant. The Court's recent pertinent cases seem to Respondent to be doing just the opposite.

The decisions in *Shaffer v. Heitner,* 433 U.S. 186, 53 L.Ed.2d 683, 97 S.Ct. 2569 (1977); *World-Wide Volkswagen v. Woodson,* 62 L.Ed.2d 490, 100 S.Ct. 539 (1980);

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[18]This argument, of course, ignores what we have pointed out above; namely, that the Florida decree is nothing more than a Georgia decree in disguise after having been "laundered" through the Florida court.

Rush v. Savchuk, 62 L.Ed.2d 516, 100 S. Ct. 571 (1980); and *Kulko v. California,* 436 U.S. 84, 56 L.Ed.2d 132, 98 S. Ct. 1690 (1978) all undertake to restrict and narrow the assertion of personal jurisdiction by a state court over non-residents.

Shaffer v. Heitner restricted the teaching of *Pennover v. Neff,* 95 U.S. 714, 24 L.Ed. 565 (1878), insofar as it suggested a liberal personal jurisdiction rule in quasi in rem proceedings, and held that "all assertions of state court jurisdiction" were subject to the *International Shoe* fiarness jurisdiction" were subject to the *International Shoe* fairness test.

World-Wide Volkswagen held that the sale of a single automobile in one state which was involved in a wreck in the forum state was not a sufficient "affiliating circumstance" on which the forum state could predicate personal jurisdiction over a non-resident corporation. This "one isolated occurrence and whatever inferences can be drawn therefrom" was an inadequate basis for the court's exercise of jurisdiction. This Court also repudiated the idea of "foreseeability" except where the defendant's conduct is such that he should foresee that he may be sued in the forum state.

Rush held *inter alia* that the forum court could not constitutionally attribute the contacts of one party with the forum to that of another party even though there existed some kind of close relationship between the two parties.

Finally, *Kulko* demonstrated that even if this Court finds it necessary to reach the personal jurisdiction question, Florida did not have proper basis for asserting personal jurisdiction over Respondent.

In that case, California sought to exercise personal jurisdiction over a New York resident who had sent his chold to live with his ex-wife in California. A few quotes from

Kulko demonstrate its pertinent holdings and its applicability to our case, as well as its implicit approval of *May v. Anderson* (which it cites):

> "The cause of action herein asserted arises, not from the defendant's commercial transactions in interstate commerce, but rather from his personal, domestic relations. It thus cannot be said that Appellant has sought a commercial benefit from solicitation of business from a resident of California that could reasonably render him liable to suit in state court. . . .Furthermore, the controversy between the parties arises from a separation that occurred in the State of New York; Appellee Horn seeks modification of a contract that was negotiated in New York and that she flew to New York to sign. As in *Hanson v. Denckla,* 357 U.S. at 252, 2 L.Ed.2d 1238, 78 S. Ct. 1228, the instant action involves an agreement that was entered into with virtually no connection with the forum state. . . .It is Appellant who has remained in the state of the marital domicile, whereas it is Appellee who has moved across the continent" (citing *May v. Anderson*) 436 U.S. 97, 56 L.Ed.2d 144.

When our case is viewed in light of *Kulko* and the other personal jurisdiction cases just discussed, the following similarities appear:

1. Respondent's contact with Florida consisted of one isolated transaction of a non-commercial, personal nature, i.e., domestic relations. It was pursuant to an emergency situation called to his attention by the Florida authorities and with their full knowledge and consent;
2. The litigation between Respondent and Petitioner arises from a Georgia divorce and custody agreement which Petitioner agreed to while in Georgia and which had virtually no connection with Florida;
3. The Petitioner is the one who left the state of marital domicile and who has repeatedly moved her residence.

Thus, when only the contacts of Respondent with Florida are viewed, in accordance with *Rush, supra,* it is clear that *Kulko, World-Wide* and *Shaffer* raise grave doubts about the ability of Florida to exert personal jurisdiction over Respondent. These decisions are consistent with *May v. Anderson* and commend its continuing vitality, not its "consignment to history".

Finally, the Petitioner's argument on full faith and credit and personal jurisdiction totally ignores the fact that the U.C.C.J.A. is strictly a comity based Act.[19] It was intended to operate on the basis of cooperation between the adopting states, not on mandatory Constitutional principles such as full faith and credit.

> "The full faith and credit clause is not to be applied, accordion-like, to accommodate our personal predilections. It substituted a command for the earlier principles of comity and thus basically altered the status of the states as independent sovereigns." *Estin v. Estin,* 334 U.S. at 545-546, 92 L.Ed. 1567.

Comity is:

> "Courtesy, complaisance, respect, a willingness to grant a privilege, not as a matter of right, but out of deference and good will. Comity is not a rule of law, but one of practice, convenience and expediency." BLACK'S LAW DICTIONARY, p. 334 (1957).

Georgia has viewed the U.C.C.J.A. as being based purely upon comity. While in the process of enforcing a Missouri custody decree against a Georgia resident, the Georgia Supreme Court stated that:

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[19]The Act was created on the basis of the concept of comity. See Amicus brief of National Conference of Commissioners on Uniform State Laws, p. 4. See also, *The Uniform Child Custody Jurisdiction Act: Progress and Pitfalls,* 17 Georgia State Bar Journal, p. 72 (1980); U.C.C.J.A., Commissioner's prefatory note, 9 U.L.A. p. 111 (1979).

> "It is, therefore, apparent that the General Assembly has mandated that the public policy of this state is to recognize, under principles of comity, child custody decrees where there is no personal jurisdiction that would satisfy the full faith and credit clause of our Federal Constitution." *Yearta v. Scroggins,* 245 Ga. at 832

In a case subsequent to *Yearta,* Georgia, while holding the U.C.C.J.A. Constitutional, restated its view that full faith and credit and personal jurisdiction arguments of the *May v. Anderson* type have nothing to do with enforcing the U.C.C.J.A.

> "When a due process violation is alleged, we cannot be sidetracked by arguments founded in the full faith and credit clause. (citations omitted) There are certainly judgments valid in one state and binding to anyone within its bounds which need not be given force elsewhere. Those judgments dealing with the welfare of a child may be given peculiar scrutiny in each interested state, but they are not less valid within the boundaries of the state rendering them." (citing *May v. Anderson*) *Goldfarb v. Goldfarb,* 246 Ga. at 28 (1980).

The point of all this is that it is a little difficult to see why, from a theoretical standpoint, full faith and credit and *Kulko* tye personal jurisdiction questions have anything to do with a statute such as the U.C.C.J.A. which everyone knew from the outset was enforceable between adopting states only on the basis of comity and cooperation. In appropriate cases, the Act is designed to go beyond full faith and credit, *Yearta, supra,* and to do so, not because of any mandatory compulsion, but because an adopting state is cooperating to solve the child-snatching problem. Full faith and credit has no place in the child custody decree area—this Court has never said that it does. It has even less of a place in connection with U.C.C.J.A. decrees, which depend for their enforcement

upon comity—a concept which is the antithesis of full faith and credit.

The instant case, *Webb v. Webb* did not even mention full faith and credit because Petitioner never raised the issue and because the U.C.C.J.A. is being administered in Georgia apart from the restrictions inherent in the full faith and credit approach. *Yearta* and *Goldfarb, supra,* make that much abundantly clear. Success of the U.C.C.J.A. is predicated upon each adopting state acting responsibly. The failure to so act, however, is not a full faith and credit clause violation because the only basis for the Act is comity. The *Webb* court simply exercised its right as an adopting state to interpret the U.C.C.J.A. in the circumstances of this case. Jurisdiction was found to be in Georgia under the Act on the basis of the child's physical presence and an emergency.[20] Full faith and credit was never urged to the court below, and even if it had been, it had nothing to do with the case. The court viewed the situation as one justifying a denial of comity to the Florida proceeding and requiring an assumption of jurisdiction by Georgia to deal with its *own* custody decree. *Webb* has now been limited to this unusual set of facts, see *Yearta, supra,* page 10, and there is no valid reason for this Court to disturb it.

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[20]Certainly the Georgia court had sufficient evidence to justify its factual conclusion of emergency. Any prudent court would be concerned about a six-year-old child left without adult supervision for a week-end. The court could use its common sense to see the danger to such a child from items commonly found in most households, such as electricity, gas, firearms, chemicals, etc.

III.

UNDER THE LAW OF FLORIDA AND GEORGIA, CHILD CUSTODY DECREES DO NOT HAVE THE REQUISITE FINALITY TO REQUIRE THE APPLICATION OF THE FULL FAITH AND CREDIT CLAUSE.

In Florida a child custody decree may be modifed "upon a showing of competent substantial evidence that: (1) there has been a substantial change in the condition of the parties and (2) the best welfare of the child will be promoted by the change of custody.[21]

In Georgia modification is governed by statute[22] and common law.[23] The pertinent language of the statute is: "The provisions of this Code section shall not limit or restrict the power of the Court to enter judgment relating to custody of a minor in any new proceeding based upon a showing of a change in any material conditions or circumstances of a party or the minor.[24]

The Florida judgment would be subject to attack in Florida since there is nothing in the record that indicates that the Circuit Court of Alachua County considered evidence of any change in the condition of the parties. In fact, petitioner did not allege changed circumstances in her Petition to Establish, Enforce and Modify Foreign Judgment (J.A. 6-

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[21]*Stricklin v. Stricklin,* 383 So.2d 1183, 1184 (1980); *Sanders v. Sanders,* 376 So.2d 880, 882 (1979); *Bennett v. Bennett,* 73 So.2d 274, 278 (1954); *Belford v. Belford,* 32 So.2d 312, 313 (1947).

[22]Ga. Code Ann. § 30-127.

[23]*Robinson v. Ashmore,* 232 Ga. 498 (1974).

[24]Ga. Code Ann. § 30-127(b).

8), nor did the court make a finding of substantial change in circumstances. (J.A. 25-26)

In addition, Florida law considers a custody decree as res judicata only as to facts and issues that were known by the court on the date of its decree.[25] "A decree is a final adjudication based on facts *then presented in evidence.*"[26] Florida's primary concern is the welfare of the child, and so it should be. If there was evidence of conditions, affecting the welfare of the child, that occurred since the original decree and the Florida court did not consider this evidence, then a Florida court would not be precluded from considering this evidence in a subsequent modification proceeding. Res judicata and finality have a different meaning when applied to child custody cases. The divorce decree is a final adjudication as to the status of the parties to the divorce proceedings, but the capacity, ability, or fitness of the parto to whom the child was awarded may become entirely different. In child custody determinations the primary concern is always the best interests of the child. If the custody decree was final in the traditional sense, the child would be made to suffer. Both Georgia and Florida recognize this policy and, as noted, allow prospective modification of custody decrees. Therefore the Georgia court was not precluded from hearing evidence of changed circumstances dating back to its original decree. Under the rule of *Halvey, Ford* and *Kovacs,* what Florida may do, Georgia may do.[27]

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[25]*Patterson v. Patterson,* 214 So.2d 381 (1968); *Bennett v. Bennett,* 73 So.2d 274, 277 (1954); *Belford v. Belford,* 32 So.2d 312, 314 (1947).

[26]214 So.2d at 382 (emphasis added).

[27]*Supra* note 9.

IV.

FLORIDA LACKED JURISDICTION OF THE CUSTODY ISSUE BECAUSE THE CIRCUIT COURT OF ALACHUA COUNTY DID NOT FOLLOW THE PROVISIONS OF THE UNIFORM CHILD CUSTODY JURISDICTION ACT (UCCJA) WHICH NOW RULE JURISDICTION OVER CHILD CUSTDY CASES IN BOTH FLORIDA AND GEORGIA.

As previously mentioned, this case does not involve an initial custody determination, but an attempt by a Florida court to modify and enforce an original Georgia custody decree. Both Florida and Georgia have passed the Uniform Child Custody Jurisdiction act (U.C.C.J.A.).[28] As a result of passing the U.C.C.J.A., both states have agreed as a matter of comity to cooperate in child custody matters. Also, both states recognize the essential policies of the U.C.C.J.A. as expressed in section 1.[29]

A short discussion of the background of the U.C.C.J.A. will help put Florida's failure to follow their own statute in perspective. In child custody disputes, the welfare of the child is, for obvious reasons, viewed as an important counterbalance to our usual interest in finality which finds its expression in the important doctrines of collateral estoppel,

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[28]9 U.L.A. Child Custody Jurisdiction 111-170, § § 1-28; (1979); Fla. Stat. Ann. § § 61.1302-.1348 (West); Ga. Code Ann. § § 74-501 to 525 (Supp. 1980).

[29]9 U.L.A. 116-117; Fla. Stat. Ann. § 61.1304; Ga. Code Ann. § 74-501.

res judicata, and full faith and credit. This strong interest in the welfare of the child led to a notion of concurrent jurisdiction in the context of child custody determination. Justice Traynor, writing in *Sampsell v. Superior Court,* 197 P.2d 739 (1948), addressed the problem in his usual cogent way and recognized that as long as flexibility was necessary in a child custody case, the critical point in interstate custody cases was to obtain control over the power to modify as well as the power to make the initial award. Traynor's concept of "concurrent jurisdiction" would allow jurisdiction to award or modify custody in several states: the state of the child's domicile, the state where the child is physically located, or the state which has personal jurisdiction over the parents. The notion was that excessive conflict between these concurrent jurisdictions could be avoided by each state's respect for the other and the strong interest in cooperation. This view was adopted by the Restatement (Second), Conflict of Laws Section 79 (1971). However, this approach was criticized as allowing too much uncertainty in the area which redounds to the disadvantage of the child. Professor Ratner, whose writings form the basis of the alternative approach to this problem, criticized the *Sampsell* approach as follows:

> "The *Sampsell* opinion performed the valuable function of carefully reexamining the jurisdictional problem, but the multiple jurisdiction-No full faith and credit solution reflects the inadequacies of its conventional components: unilateral removal of the child is encouraged and the custody decision may be made by a forum that is unfairly inconvenient to the stay-at-home parent and far from most of the relevant evidence. In addition, litigation may proliferate. Separate actions by divergent parents can produce conflicting decrees. . ." Ratner, Legislative Resolution of the Interstate Child

Custody Problem: A Reply to Professor Currie and a Proposed Uniform Act, 38 S.Cal.L.Rev. 183, 193 (1965).[30]

In short, state courts were not able to exercise the requisite sensitivity to interstate cooperation to shield the child from damaging instability. The solution to this problem was to find a way to heighten the certainty and finality in custody cases without sacrificing the important interests in flexibility necessary to protect the child. The key is interstate co-operation, which works toward finding one state which is the proper forum to make and modify custody awards and then requires states to defer to that state and hold the line against repetitive litigation of the issue.

The U.C.C.J.A. was passed in an attempt to address these problems. The Act has proved popular and has been passed by 42 states including Georgia and Florida. The Act seeks, in the typical case, to vest jurisdiction in one state only. The Reporter for the U.C.C.J.A. describes the outlines of this Act as follows:

> "The basic scheme of the Act is simple. First, one court in the country assumes full responsibility for custody of a particular child. Second, for this purpose a court is selected which has access to as much relevant information about the child and family in the state as possible. Thurd, other essential evidence, which is inevitably out-of-state in the case of an interstate child, is channelled into the first court which might be called the 'custody court'. Fourth, other states abide by the decision of the custody court and enforce it in their territory, if necessary. *Fifth, adjustments in visitation and other ancillary provisions of the decree, and*

[30]Bodenheimer, "The Uniform Child Custody Jurisdiction Act: A Legislative Remedy for Children Caught in the Conflict of Laws", 22 Vand. L.R. 1207, 1218-19 (1969).

> *custody changes, if any, are as a rule made by the original custody court.* Sixth, if the child and his family no longer have appreciable ties with the state of the original court, a new custody court is selected to take the place of the original one for purposes of adjustments and modifications, and pertinent information is channelled from the prior to the subsequent custody court." (emphasis added)

The spirit of the Act calls for interstate cooperation, and the Act represents a creative legislative response to the manifold pressures impinging on a child custody decision. In an area where strong interests compete for space in the overall equation, the political process is precisely the locus of legitimate decision making. Both Florida and Georgia have adopted the Uniform Act in an effort to solve the problems. But the final solution cannot be achieved by the wooden imposition of the full faith and credit clause on this complex decision. As the interest in finality and certainty is reduced, we face increasing problems of child kidnapping, constant relitigation and possible psychological damage to the child, while elevating finality and certainty leads to problems of ignoring the welfare of the child in changed circumstances, ignoring the proper claims of the parent, ignoring the demands of fair procedure and ignoring the interests of states with significant and important connections with the family. Clearly, this is an area where sensitive, contextual judgments are needed, as opposed to a simple, straightforward rule for all cases.

To react to the child kidnapping problem, which is undoubtedly a real problem, by instituting a rigid finality requirement would be to solve one problem while creating other, more serious ones. This case is a perfect vehicle to illustrate that point. To demand full faith and credit be given to a state judgment made pursuant to a comity based statute,

where the state judgment is not made in the spirit of cooperation demanded under the Act, where the state has questionable jurisdiction of the case at best, and where the interests of Georgia are so strong as to be labeled compelling, is to elevate finality to the exclusion of other important interests. However, there are many importasnt interests in the child custody area that cannot be subjugated to finality. The most important of these interests is the concern for the welfare of the child. But several other interests are important and must not be submerged altogether. Professor Clark, in his excellent casebook on the law in this area,[31] after commenting on the strong interest in the welfare of the child, points out that:

> "At the same time it is true that parents or other contending parties in custody cases have claims which must be heard and respected. The court as an agency of the state is not, under our legal system, given unlimited authority to do whatever it sees fit to benefit the child. It must act in the context of litigation between individual claimants, on the basis of evidence before it. There may often be situations in which the general percept that the child's welfare controls will be in conflict with the claims of parents and the demands of fair procedure. Such conflicts have to be faced and resolved. It is not only useless but harmful to pretend that they do not exist. (p. 1026)

Thus, in fashioning an orderly response to the problem of custody determination, several interests must be balanced: the welfare of the child, the claims of the parents, the demands of fair procedure, as well as the interest of a sovereign state in effectuating its own policies in the area of family relations.

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[31]Clark, *The Law of Domestic Relations* (1968).

The Act attempts to address all of these competing interests, but can only do so if states will follow its provisions faithfully and defer to each other's judgments when properly made. Both Georgia and Florida law, in general, expressed a willingness to follow the mandates of the Act.[32] However, in this case the Circuit Court of Alachua County, Florida essentially ignored the Act and proceeded to modify Georgia's judgment in what might be characterized as a punitive decree. A discussion of the relevant provisions of the Act will demonstrate the lack of attention to the Act accorded by the Florida Circuit Court.

The Act makes clear that mere physical presence without more is not enough to give a state court jurisdiction to determine custody or to modify a foreign custody decree. By removing this jurisdictional foundation, the Act moves to solve the major problems associated with child kidnapping and subsequent relitigation in foreign states with little or no connection with the case. In order to obtain jurisdiction under the Act, the case must meet one of four criteria. The primary two jurisdictional bases under the Act are the so-called "home state" test[33] (the state in which the child has been living with a parent for six months) and the "best interest of the child" test[34] (the child and at least one contestant have a significant connection with the state and

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[32]*Matthews v. Matthews,* 238 Ga. 201, note 5, 203 (1977); *Reid v. Adams,* 241 Ga. 521, 527 (1978); *Yearta v. Scroggins,* 245 Ga. 831 (1980); *Hofer v. Agner,* 373 So.2d 48 (1979); *Hegler v. Hegler,* 383 So.2d 1134 (1980).

[33]9 U.L.A. Child Custody Jurisdiction 122-23, § §(a) (1) (1979); Fla. Stat. Ann. §61.1308(1)(a); Ga. Code Ann. §74-504(a)(1).

[34]9 U.L.A. §3(a) (2); Fla. Stat. Ann. §61.1308(1)(a); Ga. Code Ann. §74-504(a) (2).

there is available in the state substantial evidence on which an informed custody decision can be made).

In the case at bar, Florida can claim jurisdiction under the "home state test" and Georgia can claim jurisdiction under the "best interest of the child" test. Petitioner agrees with this conclusion in her brief to the Supreme Court of Georgia,[35] and the Florida courts have also agreed. In *Hofer v. Agner,* 373 S.2d 48 (1979), a Florida couple was divorced and the mother was given custody of two young children with visitation rights to the father. The mother subsequently moved to New Jersey in June, 1976, and the father filed a petition in Florida for change of custody in July, 1978. The mother filed a motion contending that Florida lacked jurisdiction by virtue of the U.C.C.J.A. The Florida courts agreed that Florida did not have jurisdiction under the "home state" test since the mother had been in New Jersey for more than six months. However, the Florida courts determined that the trial court did have jurisdiction of this case under Florida Statute Section 61-1308(1) (b) because it was in the best interest of the child that Florida assume jurisdiction. As the court stated,

> Although the children in this cause now reside in New Jersey with their mother and stepfather, they have lived the majority of their lives in Florida and their other relatives reside here. Section 61.1308(1) (b) does not require that a child's only "significant connection" be with the state of Florida in order for jurisdiction of the Florida court to attach. It only requires that the child have a "significant connection" with this state. In view of the history of this case as above related and such facts as are shown in the record, we cannot say that they conclusively established that jurisdiction should be relinquished by the Florida court. (p. 51)

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[35]Brief for Appellant at 14, *Webb v. Webb,* 245 Ga. 650 (1980).

The problem with this result is that it seems to leave untouched the problems associated with concurrent jurisdiction which caused the need for statutory reform. Not surprisingly, the Act addresses this problem and has provisions to reduce the conflicts caused by such concurrent jurisdiction. The case at bar is concerned with a modification of a Georgia award of custody. In such cases, the Act is very clear as to which state has jurisdiction. As it states in Section 14,

> If a court of another state has made a custody decree, a court of this state shall not modify that decree unless it appears to the court of this state that the court which rendered the decree does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with this Act or has declined to assume jurisdiction to modify and the court of this state has jurisdiction.[36]

Therefore, the Act is clear that Florida can exercise jurisdiction in this case only after determining that Georgia no longer has jurisdiction or has declined to exercise jurisdiction. The comments to this section in the U.C.C.J.A. indicate that all petitions for modification should be made to the prior state as long as that state still has sufficient contact with the case to satisfy the jurisdictional requirements of the Act (either the home state test or the best interest of the child test). The best interest of the child test for jurisdiction states that:

> "It is in the best interest of the child that a court of this State assume jurisdiction because (i) the child and his parents, or the child and at least one contestant, have a significant connection with the state, and (ii) there is

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[36]9 U.L.A. 153-155; Fla. Stat. Ann. §61.133; Ga. Code Ann. §74-515(a).

> available in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships."[37]

Under this jurisdictional test, Georgia certainly has jurisdiction and has not declined to assume such jurisdiction thus foreclosing the Florida court from modifying the Georgia decree. Georgia issued the original decree. Pursuant to its decree petitioner took the child to the state of Florida. She moved with the child a total of six times in a two-year period. (T. 113, 114) The findings of the Georgia court show that she abandoned her child in Gainesville, Florida on February 19, 1979. Respondent went to Florida to get the child only after the Florida authorities summoned him, and returned to Georgia, the state where custody was decided initially. (T. 22-24) On the basis of these facts, the Georgia court determined that it was in the best interest of the child that it take jurisdiction. (J.A. 40).

As the comments to the U.C.C.J.A. state:

> "In order to achieve greater stability of custody arrangements and avoid forum shopping, subsection (a) declares that other states will defer to the continuing jurisdiction of the court of another state as long as that state has jurisdiction under the standards of this Act. In other words, all petitions for modification are to be addressed to the prior state if that state has sufficient contact with the case to satisfy section 3. The fact that the court had previously considered the case may be one factor favoring its continued jurisdiction. If, however, all the persons involved have moved away or the contact with the state has otherwise become slight, modification jurisdiction would shift elsewhere.
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> For example, if custody was awarded to the father in state 1 where he continued to live with the children for

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[37] *Supra* note 34.

two years and thereafter his wife kept the children in state 2 for six and one-half months (three and one half months beyond her visitation privileges) with or without permission of the husband, state 1 has preferred jurisdiction to modify the decree despite the fact that state 2 has in the meantime become the 'home state' of the child."[38]

It does not appear that the Florida court at the time it issued its order considered whether or not Georgia had jurisdiction under the Act or had declined to assume jurisdiction under the Act. In fact, Florida was put on notice by petitioner that Georgia had issued the original decree and that there "may be pending litigation in the State of Georgia". (J.A. 12) However, it is clear that if the Circuit Court of Alachua County, Florida had followed the Uniform Child Custody Jurisdiction Act, it would have referred the case to Georgia under Section 14 of the Act. Thus, Florida could not claim jurisdiction under the Act and Georgia was under no compulsion to grant full faith and credit to the Florida decree.

The two other less important jurisdictional bases under the Act are the "emergency test"[39] (based on physical presence of the child in the state where emergency conditions exist; i.e., abandonment, or threat of mistreatment or abuse, or where the child is otherwise neglected or dependent), and the "absense of alternative"[40] test (where no other state has

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[38]9 U.L.A. at 154.

[39]9 U.L.A. § 3(a) (3); Fla. Stat. Ann. § 61.1308 (1) (c); Ga. Code Ann. § 74-504(a) (3).

[40]9 U.L.A. § 3 (a) (4); Fla. Stat. Ann. § 61.1308 (1) (d); Ga. Code Ann. § 74-504 (a) (4).

jurisdiction under the first three tests or has declined to exercise it so that it is in the best interest of the child that the forum state exercise jurisdiction.)

Certainly the Georgia court had jurisdiction under Georgia Code Annotated Section 74-504(3) which is Section 3(a)(3), the emergency section of the U.C.C.J.A. Respondent was contacted by the Florida authorities and informed that his child had been abandoned by his former wife. Respondent called his attorney for advice and then called the Florida Division of Family and Children Services in Gainesville to inform them of the situation. After taking these precautions he went to Florida to get his child. (T. 22-24) When he arrived in Florida, he informed the juvenile authorities in Gainesville of the situation and gave them his name, address and phone number. (T. 124-125)

Florida law recognizes that the primary concern is the best interests of the child and that under the U.C.C.J.A. if the child is physically present in a state and it has been abandoned or it was necessary in an emergency to protect the child,then the state with physical custody has jurisdiction.[41]

Under the U.C.C.J.A. Georgia had continuing jurisdiction and Florida was bound by the Act to allow Georgia to exercise that jurisdiction. In the spirit of the Act Florida should have contacted the Georgia court and initiated a cooperative effort to determine which court should decide the issue of modification of the original decree. This kind of cooperation is crucial to the continued validity and effectiveness of the U.C.C.J.A. Florida did not make any effort to inquire into jurisdiction in Georgia; if it had, it

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[41]Fla. Stat. Ann. §61.1308(1)(c); See, *Hegler v. Hegler,* 383 So.2d 1134 (1980); *Trujillo v. Trujillo,* 378 So.2d 812 (1980).

probably would have concluded that Georgia had jurisdiction under the U.C.C.J.A. In addition, Florida did not comply with Section 22 of the U.C.C.J.A. and request a certified copy of the transcript of the hearing on the original custody decree.

As long as Georgia had jurisdiction, Florida violated the U.C.C.J.A. when it modified the Georgia decree. Since the U.C.C.J.A. confers jurisdiction upon courts and Florida did not follow the dictates of the U.C.C.J.A., Florida did not have subject matter jurisdiction under the Act. The Supreme Court of Georgia recognized this lack of jurisdiction and stated: "we find that the pendency of the Florida action at the time the Georgia action was filed did not preempt the jurisdiction of the Georgia Court." (J.A. at 50)

Petitioner contends, in her petition for certiorari (at 2), that upon the order of the Florida court, the Georgia decree awarding her custody became a Florida decree. Therefore, she reasons, Georgia must give it full faith and credit. However, in its amici brief, the National Conference of Commissioners on Uniform State Laws pointed out that Sections 13 and 15 of the Act do not domesticate the foreign decree.[42] The Georgia decree did not become a Florida decree. Under sections 13 and 15 of the Act, Florida was merely required to recognize and enforce the decree, in like *manner* as a custody decree rendered by a circuit court of the state.[43] Florida was not required to consider nor did they consider evidence of changed circumstances since the date of the Georgia decree. In fact, all that Petitioner was required to do was file a certified copy of the Georgia decree

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[42]Amici Curiae Brief for National Conference of Commissioners on Uniform State Laws at 4.

[43]9 U.L.A. 151-153 and 158-159; Fla. Stat. Ann. §61.1332.

in the office of the clerk of district court. It is clear that Sections 14 and 15 are to be read together.[44] As the official comments to Section 15 note, "The authority to enforce an out-of-state decree does not include the power to modify it. If modification is desired, the petition *must* be directed to the court which has jurisdiction to modify under section 14.[45]

It is a well-established rule of law that a court of one state need not give full faith and credit to the judgment of a sister state, taken without jurisdiction over the subject matter[46] or person. There is no indication that the issue of jurisdiction was fully litigated in the Florida court. Since no issue was made of jurisdiction in Florida, the Georgia court could consider the validity of Florida jurisdiction. The Georgia courts were not required to give full faith and credit to a judgment brought pursuant to the U.C.C.J.A alone, when Florida did not have jurisdiction under that Act.

CONCLUSION

The question presented for review has not been adequately raised in the Court below. Even if the full faith and credit issue was properly before this Court, the Georgia Supreme Court's decision should be affirmed for the variety of reasons which we have set out above.

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[44]Commissioner's notes to §13 says as much: "this section and sections 14 and 15 are the key provisions which guarantee a measure of security and stability of environment to the 'interstate child' by discouraging relitigation in other states." 9 U.L.A. at 151.

[45]9 U.L.A. 158 (emphasis added)

[46]*Durfee v. Duke,* 375 U.S. 106 (1963).

This Court should dismiss the writ of certiorari as improvidently granted or in the alternative, affirm the Georgia Supreme Court on the merits of the issue presented. In any event, the Georgia judgment in favor of Respondent should be left intact.

RESPECTFULLY SUBMITTED,

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